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Supreme Court of the United States

October Term 1975
No. 75-217

JOSEPH A. SPAGANLO and
HARVEY TRIFLER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming judgment of the District Court in this case.

OPINIONS BELOW

There being neither opinion nor judgment pronounced by the Court of Appeals, the Order of said Court is printed in the Appendix attached hereto, *infra*, p. 7.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals was entered on June 23, 1975, and jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

1. Whether the court's instruction that "every witness is presumed to speak the truth" is proper in a trial in which over forty witnesses were called by the prosecution and none by the defense.

STATUTES INVOLVED

18 U.S.C. §371

Section 371. Conspiracy to commit offense or to defraud United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §1955

1955. Prohibition of illegal gambling businesses. —(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seiz-

ures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended [26 USCS § 501 (c) (3)], if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

STATEMENT OF THE CASE

Petitioners and fifteen co-defendants were indicted for conspiracy, in violation of 18 U.S.C. 371, and operating an illegal gambling business, in violation of 18 U.S.C. 1955. The matter was tried before a jury in the United States District Court for the Northern District of Ohio, Eastern Division, and resulted in a verdict of guilty with regards to petitioners and not guilty with regards to the other co-defendants.

Prior to trial, the court overruled certain motions to suppress that challenged the admissibility of evidence derived from intercepted telephone communications. During trial, the government called as witnesses twenty-seven FBI agents, seven telephone company employees, four gamblers, and three miscellaneous witnesses.

The case centered around the admission into evidence of numerous tape recordings of intercepted telephone conversations. Said tapes involved the purported illegal gambling activities of the defendants. These tapes attempted to prove that petitioners and the other defendants operated a sports betting business. The witnesses for the prosecution

interpreted the tapes in such a manner as to allegedly prove the unlawful conduct referred to in the indictments and the volume of illegal business handled by the defendants.

After the prosecution rested its case, the defense chose not to present any witnesses. During its charge to the jury, the court stated as follows with regards to the assessment of the credibility of witnesses:

> "Every witness is presumed to speak the truth; however, if you find the presumption of truthfulness to be out-weighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves." (R. 3443.)

The manner in which this segment of the charge was phrased is the basis for the within petition for a writ of certiorari.

REASON FOR GRANTING THE WRIT

The trial court's instruction to the jury that "every witness is presumed to speak the truth" constitutes reversible error where over forty witnesses had been called by the government and none by the defendants.

As stated, petitioners allege that the abovementioned portion of the charge is prejudicial and warrants a reversal of their conviction. It is important to consider that the government called numerous witnesses, while the defense had none. By stating that every witness is presumed to speak the truth, the court has, in effect, placed its own endorsement upon the truthfulness and veracity of the government's witnesses. In essence, the Court is stating that the government has proved its case since all its witnesses are presumed to have spoken the truth. Petitioners claim this comment is improper and was a wrongful exertion of influence over the jury.

In support of this contention are the cases styled *United States v. Johnson*, 371 F.2d 800 (3rd Cir. 1967), and *United States v. Birmingham*, 447 F.2d 1313 (10th Cir. 1971), which have held that a charge such as the one in question must be construed as reversible error.

The significance of this charge is emphasized by the fact that the defense called no witnesses on its behalf. If they had, it is likely that there would be no argument with this charge, since each side would equally benefit from its implication. However, since the defense had no witnesses, the government gained an undue advantage from the judge. Accordingly, the petitioners were denied a fair trial and the due process rights to which they were entitled.

CONCLUSION

In view of the improper charge and the influence it may have had with the jury to the detriment of petitioners, this Honorable Court is now requested to grant this petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

ORDER OF THE COURT OF APPEALS

(Filed June 23, 1975)

No. 75-1049
No. 75-1703

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

JOSEPH A. SPAGANLO
and
HARVEY TRIFLER,
Appellants.

ORDER

BEFORE: CELEBREZZE, PECK AND LIVELY, *Circuit Judges.*

These direct appeals from jury convictions for violation of 18 U.S.C. § 371 and § 1955—operating an illegal gambling business and conspiring to do so—present several issues for determination by the court. The appellants contend that the district court erred in denying their motion to suppress the contents of telephone conversations which were intercepted pursuant to a district court order authorizing such interceptions. Though the FBI agent who prepared a lengthy affidavit in support of the application for the intercept order in this case failed to sign the

affidavit, it is undisputed that he swore to the contents of the affidavit in the presence of the District Judge prior to entry of the intercept order and that the application itself was signed by a representative of the Department of Justice. We find literal compliance with the requirements of U.S.C. § 2518(1) since the record discloses and the order authorizing the interception recites that the Judge based such order on the application and sworn statements made in his presence.

The appellants maintain that they were entitled to interrogate jurors concerning their familiarity with and possible prejudice by a series of newspaper articles concerning local gambling which appeared during the trial. The record discloses that the District Judge offered to conduct a voir dire of the jury to determine whether any member was aware of this publicity and whether it had any effect upon such jurors and that several of the defendants in the trial, including one of the appellants, were opposed to this procedure.

The appellants also complain of several features of the court's instructions to the jury. Examination of the entire charge reveals that the jury was correctly instructed on the issues presented at the trial.

Upon examination of the record and consideration of briefs and oral arguments, the court concludes that no error prejudicial to the rights of the appellants occurred in the district court proceedings.

The judgments of conviction are affirmed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, *Clerk*

By /s/ GRACE KELLER
Chief Deputy

JUDGMENT AND COMMITMENT OF THE DISTRICT COURT

(Filed May 2, 1974)

No. Cr73-600

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

UNITED STATES OF AMERICA,

v.

JOSEPH ANTHONY SPAGANLO,
aka JOSEPH ANTHONY SPAGNOLO,

On this 2nd day of May, 1974 came the attorney for the government and the defendant appeared in person, and by Fred Jurek, counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of having violated Title 18, Section 371, U.S.C. as charged in Count 1 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years; on the condition that the defendant serve the first six (6) months in a jail-type institution, the re-

mainder of the sentence shall be served on probation; further,

IT IS ORDERED that the defendant be fined the sum of $10,000, payable within 18 months from this date.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Leroy J. Contie, Jr.
United States District Judge

JUDGMENT AND ORDER OF PROBATION OF DISTRICT COURT

(Filed May 2, 1974)

No. Cr73-600

UNITED STATES DISTRICT COURT

Northern District of Ohio, Eastern Division

UNITED STATES OF AMERICA,

v.

HARVEY TRIFLER

On this 2nd day of May, 1974, came the attorney for the government and the defendant appeared in person, and by Fred Jurek, counsel.

It Is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of having violated Title 18, Section 371, U.S.C. as charged in Count 1 of the Indictment and the court hav-

ing asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of five (5) years from this date; further,

IT IS ORDERED that the defendant be fined the sum of $7500, said fine to be paid within 18 months from this date.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ LEROY J. CONTIE, JR.
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-217

JOSEPH A. SPAGANLO AND HARVEY TRIFLER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (Pet. 5-6) that the trial court committed plain error in instructing the jury that "every witness is presumed to speak the truth."

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioners were convicted of conspiring to conduct a gambling business prohibited under 18 U.S.C. 1955, in violation of 18 U.S.C. 371.[1] Spaganlo was sen-

[1] Petitioners were indicted with fifteen other persons. One defendant pleaded guilty prior to trial, the trial of five of the

tenced to six months' imprisonment, to be followed by four and one-half years' probation, and was fined $10,000. Trifler was placed on five years' probation and was fined $7,500 (Pet. App. 9-11). The court of appeals affirmed on June 23, 1975 (Pet. App. 7-8). Petitioners' application for an extension of time in which to file a petition for a writ of certiorari was denied by Mr. Justice Marshall on July 23, 1975. The petition was filed nonetheless on August 9, 1975, and is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

The evidence at trial established petitioners' participation in a large-scale bookmaking operation. The principal evidence against them consisted of eight tape-recorded conversations between Spaganlo and co-conspirator Al Kotoch and four such conversations between Trifler and Kotoch.[2] The only issue raised here is whether the trial court committed plain error in instructing the jury that "every witness is presumed to speak the truth."[3] Petitioners contend that

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defendants was severed from that involving petitioners, the charges against one defendant were dismissed prior to trial. At the trial involving petitioners, all of the defendants were acquitted of the substantive charge in count two and petitioners alone were convicted of the conspiracy charged in count one.

[2] Kotoch was charged in the same indictment and pleaded guilty to the conspiracy charge before petitioners' trial.

[3] Neither petitioners nor any of their co-defendants objected at trial to the disputed instruction. See Fed. R. Crim. P. 52(b).

the court's giving of such instruction improperly endorsed the government's case, since the government presented numerous witnesses at trial and "the defense called no witnesses" (Pet. 6).

Petitioners' contention is without merit for several reasons. First, its major factual premise is incorrect. The defense *did* present testimony at trial (Tr. 3329-3332). Moreover, the testimony of most of the government's witnesses did not directly inculpate petitioners, but simply explained the installation and operation of the devices that had been used to monitor certain of petitioners' telephone conversations, thus providing a foundation for the introduction of the tapes of those conversations.[4]

Second, the disputed instruction was only a small part of an exhaustive charge to the jury that covered 46 pages of transcript (Tr. 3407-3452). The court repeatedly admonished the jury that it was not to convict petitioners unless it found that the charges against them had been proved beyond a reasonable doubt. The court repeated this admonition fifteen times with reference to the conspiracy count alone (Tr. 3411-3427) and twenty-two times in all (Tr. 3428-3442). The court then instructed the jury concerning its role in evaluating the testimony at trial as follows (Tr. 3442-3444):

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[4] Indeed, petitioners concede that "[i]f [the defense had called witnesses] it is likely that there would be no argument with [the court's] charge, since each side would equally benefit from its implication" (Pet. 6). This concession is particularly damaging to petitioner Trifler, on whose behalf the defense testimony was ostensibly offered (Tr. 3325).

You, as jurors, are the sole judges of the credibility of witnesses and the weight their testimony deserves. In testing the credibility of witnesses you may consider the behavior of the witnesses upon the witness stand, their manner of testifying, the reasonableness and probability of their testimony, the opportunity they had to see, hear, and know the things about which they testified, the accuracy of their memory, their candor or lack of candor, their intelligence, interest, and bias, if any, together with all the circumstances surrounding their testimony. Applying these tests you will assign to the testimony of each witness such weight as you deem proper.

* * * * *

Every witness is presumed to speak the truth; however, if you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider also any relationship each witness may bear to either side of the case, the extent to which, if at all, each witness is either supported or contradicted by other evidence.

You may apply these and other tests of truthfulness which you are accustomed to apply in your daily life to weigh and determine the value of the statements of each witness.

> You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve any witness wholly or in part.

The court also cautioned the jury that it should not single out any one instruction, but that it should consider the charge in its entirety (Tr. 3408).

Finally, this Court recently upheld a virtually identical charge in *Cupp* v. *Naughten*, 414 U.S. 141. On the facts of that case, which involved a state prosecution, this Court concluded that "the giving of [an] instruction on the presumption of truthfulness is not [a matter] of constitutional dimension" (*id.* at 149). If anything, the facts presented by the record in this case are even less favorable to petitioners' contention than were the facts in *Naughten*. In *Naughten*, the prosecution had presented the testimony of two eyewitnesses to the armed robbery for which the petitioner was ultimately convicted, as well as the testimony of two policemen who had apprehended him. The defense had not called any witnesses. At the conclusion of the testimony, the trial court had twice instructed the jury concerning the presumption of innocence and the government's obligation to prove petitioner's guilt beyond a reasonable doubt. Here, in contrast, the defense had presented testimony, and the most damaging evidence against petitioners was not the testimony of government witnesses but tape recordings of certain of petitioners' conversations. Furthermore, the phrase "beyond a reasonable doubt" was used here twenty-two times

to describe the government's burden of proof. Thus, rather than constituting plain error, we submit that the disputed instruction was—on the facts of the present case—entirely proper.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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